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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL FENNELL,

Defendant and Appellant.

B288293

(Los Angeles County
Super. Ct. No. BA456595)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Norman Shapiro, Judge. Affirmed and remanded for further proceedings.

Law Office of Laurel Simmons, Laurel Ellis Parker Simmons, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury found defendant Michael Fennell guilty of making criminal threats to a convenience store customer. On appeal, defendant contends there was insufficient evidence to support the jury's verdict. He also argues that the trial court abused its discretion when it denied his motion for mistrial based on the prosecutor's arguments about an eyewitness's motives for not testifying. Finally, defendant requests a remand for resentencing to allow the trial court to exercise its discretion under Penal Code section 1385¹ to strike the three section 667, subdivision (a)(1) consecutive five-year terms pursuant to Senate Bill No. 1393. We affirm the conviction and remand the matter to the trial court to exercise its section 1385 discretion whether to strike defendant's section 667, subdivision (a)(1) enhancements.

II. FACTUAL BACKGROUND

On April 19, 2017, at approximately 4:30 p.m., Percy Thomas went to a 7-Eleven convenience store, which he visited at least once a day for coffee and hot dogs. As Thomas walked into the store, he saw defendant standing out front with another man and a woman. Thomas noticed "[s]omething being passed [among] the three of them" and smelled marijuana.

Inside the 7-Eleven, after purchasing a drink and a hot dog, Thomas advised the clerk, Sandeep Singh, that defendant and his companions "shouldn't be smoking weed in front of [the] 7-Eleven." In response, Singh opened the front door of the store

¹ All further statutory references are to the Penal Code.

and “yell[ed] . . . to the defendant” something to the effect of “you should not be doing that outside.” Defendant replied in words or substance, “What are you going to do[,] tell on me or something”

Defendant then entered the store and his encounter with Singh became a “little heated.” Thomas “thought [he] could deflect it by telling [defendant], man you don’t need to go this way . . . [;] we don’t need to go down this road.” Defendant then asked Thomas, “you want some of this too,” and said “bitches get stitches” as he opened his coat and showed Thomas the handle of a hatchet in his waist band. Thomas told Singh to “go back behind the counter [because] he [was] unable to handle it.”

Defendant exited the store, but began “walking back and forth,” telling Thomas to come outside and stating “I will cut you up.” At that point, Thomas was afraid of being physically injured.

Thomas told Singh to call the police, and Singh made the call, but then passed the phone to Thomas. As Thomas spoke to the police, defendant left the premises. The police arrived 20 to 30 minutes later.

Los Angeles Police Officer Daniel Malek responded to the scene and spoke to Thomas, who told him about defendant’s threats and provided a description of defendant. The officer spoke with Thomas for about 25 minutes, during which time defendant did not return to the store. The officer also spoke to Singh, who stated he did not wish to make a police report. The police then left the 7-Eleven.

Thomas waited at the 7-Eleven before going home. He eventually left the store and walked about two blocks, where he

saw defendant. He decided not to continue home because he was afraid of defendant and instead returned to the 7-Eleven.

Back at the 7-Eleven, Thomas told Singh to call the police again, but before they arrived, defendant returned to the store with another man. Because Thomas knew the police were on their way, he was “not going to deal with [defendant].” Defendant’s companion withdrew money from the ATM inside the store and purchased soda. During that time, Thomas saw defendant remove the hatchet from his waistband and place it in a backpack. Defendant then left with his companion and went to a Chinese restaurant located in the same shopping complex as the 7-Eleven.

Officer Malek and his partner returned to the 7-Eleven, and Thomas informed them of defendant’s location. The officers went to the doorway of the Chinese restaurant and asked defendant to come outside. After a few minutes, defendant walked out of the restaurant, and was detained by the police. Inside the restaurant, Officer Malek found a backpack that was on a chair next to the entrance. Officer Malek searched the backpack outside and found a hatchet similar to the one described by Thomas. He showed the hatchet to both Thomas and Singh. Thomas confirmed that it was the weapon he had seen in defendant’s possession.

III. PROCEDURAL BACKGROUND

In a second amended information,² the Los Angeles County District Attorney (the District Attorney) charged defendant in count 1 with making criminal threats to Singh in violation of section 422, subdivision (a); and in count 2 with making criminal threats to Thomas in violation of section 422, subdivision (a). The District Attorney alleged as to both counts that defendant personally used a deadly and dangerous weapon within the meaning of section 12022, subdivision (b)(1); that defendant had suffered three prior violent or serious felonies within the meaning of sections 667, subdivisions (b) through (j) and 1170.12; and that defendant had suffered three prior serious felony convictions within the meaning of section 667, subdivision (a)(1).

The case proceeded to a jury trial and, following the close of evidence, the prosecutor moved to dismiss count 1, which motion the trial court granted. The jury found defendant guilty on count 2, but the verdict form submitted to the jury omitted the use of deadly weapon allegation, and no finding was made as to that issue. Defendant subsequently admitted the three prior felony convictions within the meaning of the Three Strikes law and the three prior serious felony convictions within the meaning of section 667, subdivision (a)(1).

At the sentencing hearing, the trial court struck two of the prior strike convictions and sentenced defendant to the low term

² The original information, filed June 26, 2017, charged defendant with one count of making criminal threats to Singh. On September 29, 2017, the District Attorney filed a second amended information adding count 2, making criminal threats to Thomas.

of 16 months, doubled to 32 months pursuant to the remaining strike conviction, plus three consecutive five-year terms based on the three section 667, subdivision (a)(1) prior serious felony convictions, for an aggregate sentence of 17 years and eight months.

IV. DISCUSSION

A. *Substantial Evidence: Criminal Threats*

Defendant contends that there was insufficient evidence to support the elements of the criminal threats charge under section 422. “When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.] We determine ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ [Citation.] In so doing, a reviewing court ‘presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citation.]” (*People v. Edwards* (2013) 57 Cal.4th 658, 715.)

“In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant ‘willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,’ (2) that the defendant made the threat ‘with the specific intent that the

statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,’ (3) that the threat - - which may be ‘made verbally, in writing, or by means of an electronic communication device’ - - was ‘on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,’ (4) that the threat actually caused the person threatened ‘to be in sustained fear for his or her own safety or for his or her immediate family’s safety,’ and (5) that the threatened person’s fear was ‘reasonabl[e]’ under the circumstances. (See generally *People v. Bolin* (1998) 18 Cal.4th 297, 337-340 & fn. 13)” (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.) Defendant concedes that he made a threat verbally, but contends there was insufficient evidence of any of the other elements. We disagree.

Defendant argues that there was insufficient evidence that his “behavior was . . . enough to cause death or great bodily injury” or that he “intended to cause anyone any great bodily injury.” We note these are not elements of a criminal threats violation. To the extent defendant argues there was insufficient evidence that he threatened to commit a crime that would result in death or great bodily injury, his argument also fails. Contrary to defendant’s argument, his statement, “bitches get stitches,” when uttered during a heated encounter and accompanied by the purposeful display of a weapon capable of inflicting wounds and additional threat to “cut [Thomas] up,”³ was not ambiguous in

³ Defendant’s claim that there was a dispute about whether defendant told Thomas he would cut him up is not supported by the record. Thomas initially testified that defendant made that

meaning. It was a clear expression of a desire to inflict great bodily injury, one that would require sutures. In addition, defendant's statements and conduct supported an inference that he intended Thomas to take the statements as a threat of serious bodily injury.

Defendant next argues that because he left the 7-Eleven immediately after making his statements, his threat did not convey the immediate prospect of execution of the threat. We disagree. After defendant exited the store, he paced back and forth outside menacingly and left only after telling Thomas that he would cut him up, presumably with the hatchet he carried inside his waist band.

Finally, contrary to defendant's argument, there was sufficient evidence that the threat actually caused Thomas to be in sustained fear. "Sustained fear occurs over 'a period of time 'that extends beyond what is momentary, fleeting, or transitory.'" (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1140)" (*People v. Wilson* (2015) 234 Cal.App.4th 193, 201.) Here, in response to defendant's statements and behavior, Thomas remained inside the store and immediately contacted the police. He then waited for the police to arrive and gave them a detailed report of the incident as well as a description of defendant. Even after the police left, Thomas remained afraid and waited to walk home. When he encountered defendant two blocks from the

statement, then became uncertain whether it had been made. But when Thomas's recollection was refreshed by a transcript from a body camera video, he confirmed that defendant made the statement. Moreover, even if there was a dispute in the testimony about whether defendant made the comment, we are required under the controlling standard of review to presume that the jury resolved it in favor of the prosecution.

store, Thomas immediately returned to the store, again called the police, and directed them to defendant's location once they arrived. This conduct supports an inference that Thomas actually and reasonably experienced sustained fear. Sufficient evidence therefore supports the jury's verdict.

B. *Mistrial: Prosecutorial Misconduct*

Defendant next contends that when the prosecutor suggested during rebuttal that Singh may have refused to testify out of fear of defendant, he improperly "vouched" for a nontestifying witness. According to defendant, "[t]o suggest that . . . Singh was in fear of [defendant] and of testifying goes directly to one of the key elements at issue with a criminal threats case." Defendant therefore maintains that the prosecutor's comments "had a significant impact on the jury and prejudiced the outcome."

1. Background

The prosecution did not call Singh to testify at trial, even though he was the victim identified in count 1. During direct examination, Thomas said he saw Singh "when [they] initially started the preliminary process with the court[]" about two weeks after the incident. "After that [Thomas] told [Singh] he need[ed] to get in touch with the [District Attorney's] office and then [Singh] just disappeared." Thomas had not seen Singh since that time. As noted, following the close of evidence, the trial court dismissed count 1 on the prosecution's motion.

During closing argument, defense counsel argued that the absence of Singh from trial made Thomas's testimony about the "bitches get stitches" comment suspect and untrustworthy. "So this statement of bitches get stitches, is an out of court statement. In other words, it was not uttered by [defendant] on the witness stand to you. [¶] Instead, [defendant] is being quoted as having said that outside of court. [¶] The law [says] you are to view it with caution. [¶] Why? Because without anything to corroborate it, like . . . Singh . . . coming in here, or a video from [the] 7-Eleven, it makes it suspect." Defense counsel also argued that Singh's absence from the trial and refusal to make a report supported an inference that he must not have been threatened by the incident. "[On the body camera video played for the jury] Singh is busy with his customers, just ringing people up, . . . checking to see how many ounces somebody has in a slurpee. He is not even concerned. [¶] In fact, Officer Malek [testified Singh] didn't even want to make a report. [¶] If it was so serious[,] [a]nd if [defendant] was such a menace at [the] 7-Eleven, don't you think 7-Eleven would have come into court, taken [the] stand or at least made a report? Nothing."

In rebuttal, the prosecutor addressed defense counsel's arguments about Singh's absence from trial as follows: "[Prosecutor:] You heard the argument from the defense; well there should have been a video and . . . Singh should have testified. [¶] And the defense argument was well, the fact that [Singh is not here in court, their inference is that means he is disinterested. [¶] Well, I think there is more than one inference that can be brought. [Singh never went back to work there after this case began within the first week or so after April 18th. [¶] [Defense Counsel]: That assumes facts not in evidence. [¶] The

Court: . . . [Mr. Prosecutor], I am not sure whether the objection is well taken or not, but think about what you have said[;] if you think it is correct, you may go ahead and complete your thought. [¶] Ladies and gentlemen, if that becomes an issue in your deliberation, you have the record, you have you can request [the court reporter] to read that information for you[,] if that is a point of interest to you. [¶] Go ahead, [Mr. Prosecutor].”

The prosecutor then continued with closing argument and defense counsel twice asked to approach at side bar, which requests the trial court denied.

After the prosecutor finished rebuttal, defense counsel, outside the presence of the jury, moved for a mistrial. Defense counsel argued that the prosecutor had “vouch[ed] for a non-testifying declarant. He was a named victim, that count is dismissed. Never testified, nothing came in either by way of hearsay or anything as to whether—” Counsel explained that the prosecutor “told the jury that [Singh] was afraid to come in. But . . . what I understand is that he still works for 7-Eleven; he got transferred to a different store. They chose not to put him on.”

The prosecutor responded, “In fact [Singh] had apparently been shipped to another 7-Eleven in Inglewood and then quit shortly thereafter. And we have had no contact with him whatsoever” The prosecutor submitted that his argument was based on a reasonable inference from the record.

Defense counsel responded that there was no nexus between Singh having been afraid at the time of the charged incident and being afraid five or six months later.

The trial court did not expressly deny the mistrial motion, but concluded that the prosecutor’s argument was permissible and did not grant the motion.

2. Standard of Review

“[I]n reviewing the trial court’s ruling [on a motion for mistrial], we use the deferential abuse of discretion standard. [Citations.] A trial court should grant a mistrial only if the defendant will suffer prejudice that is “incurable by admonition or instruction.” [Citations.] In making this assessment of incurable prejudice, a trial court has considerable discretion. [Citation.]” (*People v. Davis* (2005) 36 Cal.4th 510, 553-554.)

3. Legal Principles: Fair Comment/Response

“The applicable federal and state standards regarding prosecutorial misconduct are well established. “A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.”” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” [Citations.] [¶] Regarding the scope of permissible prosecutorial argument, we recently noted “a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to *fair comment on the evidence*, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] . . . [¶] Prosecutors, however, are held to an elevated standard of conduct. ‘It is the duty of every member of the bar to “maintain the respect due to the courts” and to “abstain from all offensive

personality.” [Citation.] A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. [Citation.]” (*People v. Hill* (1998) 17 Cal.4th 800, 819-820, italics added.)

In determining whether misconduct has occurred, “[a prosecutor’s] “good faith *vel non*” is not “crucial.” [Citation.] That is because the standard in accordance with which his conduct is evaluated is objective.’ [Citation.]” (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.)

If a claim of prosecutorial misconduct is based on the prosecutor’s arguments to the jury, we consider how the statement would, or could, have been understood by a reasonable juror in the context of the entire argument. (*People v. Dennis* (1998) 17 Cal.4th 468, 522). Remarks by a prosecutor that might otherwise be improper may be permissible if they are fairly responsive to argument by defense counsel and based upon the record. (*People v. McDaniel* (1976) 16 Cal.3d 156, 177; see also *People v. Pearson* (2013) 56 Cal.4th 393, 431-432 [in the context of a claim of misconduct based on denigration of opposing counsel, “we view the prosecutor’s comments in relation to the remarks of defense counsel, and inquire whether the former constitutes a fair response to the latter.”]; *People v. Frye* (1998) 18 Cal.4th 894, 978 [same].)

4. Analysis

We disagree that the challenged rebuttal arguments by the prosecutor constituted misconduct. Instead, those comments, when read in the context of defense counsel's arguments, fall within the broad range of either permissible fair comment on the evidence or fair response to the arguments of defense counsel.

In terms of fair comment, Thomas testified that shortly after the incident, he had advised Singh to contact the prosecutor's office and that he had not seen Singh since giving him that advice. Thus, regardless of defense counsel's comments about Singh's absence from the trial, the prosecutor had permissible latitude to comment fairly on the fact that, according to Thomas, Singh had failed to contact the District Attorney's office and instead had "just disappeared," including any reasonable inferences the jurors could draw from that evidence, such as, for example, Singh's fear of defendant.

Moreover, regardless of whether the prosecutor could have, during his opening argument, commented on Singh's absence from trial, the challenged comments were made during rebuttal, and only after defense counsel had injected the issue of Singh's absence into the closing arguments by suggesting that: (1) Singh's absence made Thomas's testimony untrustworthy; and (2) the nature and context of defendant's purportedly threatening comments could not have been as frightening as the prosecution claimed because Singh did not take them seriously enough to make a police report about them or participate in the trial. In light of defense counsel's arguments, the prosecutor could, in rebuttal, fairly respond by pointing out an alternative inference to be drawn from Singh's failure to make a report or participate

in the trial, i.e., he was afraid of defendant based on defendant's threats and conduct during the incident. Such comment fairly served to rebut defense counsel's assertions that Thomas's testimony was untrustworthy and that Singh was not afraid of defendant.

Accordingly, we conclude that, when viewed in the context of the trial evidence, the jury instructions, and the arguments of counsel, it is unlikely that a reasonable juror would have understood the prosecutor's limited comments during rebuttal as anything other than fair comment on the evidence or a fair response to the arguments of defense counsel.

C. *Request for Resentencing Under Senate Bill No. 1393*

Senate Bill 1393, which became effective on January 1, 2019, amended sections 667 and 1385 to give the trial court discretion to strike five-year sentence enhancements under section 667, subdivision (a)(1) in furtherance of justice. Defendant contends that in light of Senate Bill No. 1393 we must remand this matter to the trial court to allow it to exercise its section 1385 discretion whether to strike his section 667, subdivision (a)(1) enhancements. The Attorney General concedes, and we agree that remand is appropriate.

V. DISPOSITION

The cause is remanded to the trial court to permit it to consider whether to exercise its discretion to strike any of defendant's section 667, subdivision (a)(1) enhancements under section 1385. In all other respects, the judgment is affirmed.

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KIM, J.

We concur:

RUBIN, P. J.

BAKER, J.